91-357



No. _____

# In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF LOUISIANA
*Petitioner*

v.

BRIAN BRUCE
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

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## QUESTIONS PRESENTED

I. Did the court below err in holding that the due process clause of the U.S. Constitution, as interpreted by the Court in *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires a reviewing court, which is prohibited by the State Constitution from reviewing questions of fact in criminal cases, to re-examine the credibility determinations made by the trier of fact rather than defer to those resolutions?

II. Did the court below err in holding that the due process clause of the U.S. Constitution, as interpreted by the Court in *Jackson v. Virginia*, requires the reviewing court to scrutinize the factfinder's reasoning process to determine if that process was rational, and to do so in light of the theories of innocence presented by the defense and the evidence as a whole presented by both the defense and the state, rather than by reviewing all of the evidence in the light most favorable to the State?

III. Did the court below err in reversing the conviction, on federal due process grounds, of the forty-one year old male teacher-defendant for sexually molesting his then four and one-half year old male student-victim based on its finding "the hypothesis of innocence presented by the defendant (was) sufficiently reasonable that any rational trier of fact would have a reasonable doubt as to defendant's guilt," *State v. Brian Bruce*, 577 So.2d 209, 215 (La. App. 1st Cir. 1991), despite the fact that the child witness testified as to every essential element of the crime necessary to support a conviction.

## PARTIES TO THE PROCEEDINGS

Petitioner and plaintiff-appellant below is the State of Louisiana. Respondent and defendant-appellee below is Brian Bruce.

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## PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

Petitioner, the State of Louisiana, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana First Circuit Court of Appeal, entered in the above captioned proceeding on March 5, 1991, along with the Louisiana Supreme Court's denial of writ of certiorari and denial of application for reconsideration of the writ denial dated May 24, 1991 and June 28, 1991, respectively.

The court below erred in reviewing the sufficiency of the evidence supporting respondent's criminal conviction due to its misunderstanding of the requirements of due process as enunciated by this court in *Jackson v. Virginia*, 443 U.S. 307,99 Sct. 2781, 61 LEd. 2d 560 (1979).

## OPINIONS BELOW

A copy of the Louisiana Supreme Court's denial of petitioner's

Writ of Certiorari is reported at 580 So.2d 667 and is reprinted at p. 17a. A copy of the Louisiana Supreme Court's denial of petition's Motion For Reconsideration is reprinted at p. 18a.

The opinion of the First Circuit Court of Appeals for the State of Louisiana is reported at 577 So.2d 209 and is reprinted at p. 1a.

Respondent was originally convicted in a jury trial, Judge Bob H. Hester, presiding, in the Nineteenth Judicial District Court, Parish of East Baton Rouge, Case No. 9-88-984.

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## JURISDICTION

The respondent, Brian Bruce, was convicted of molestation of a juvenile in the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana. He was sentenced to fifteen years imprisonment at hard labor. The sentence was suspended and defendant was placed on active supervised probation for five years, subject to general and specific conditions. His conviction and sentence were reversed on direct appeal on March 5, 1991. An application for supervisory review to the Louisiana Supreme Court was denied without written opinion on May 24, 1991. An application for reconsideration of the writ denial was denied without written opinion on June 28,1991.

The jurisdiction of this Court to review the judgment of the Louisiana Supreme Court is invoked pursuant to 28. U.S.C. §1257.

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## PERTINENT STATUTORY PROVISIONS

U.S. Const. amend. XIV, §1, provides:

**Amendment XIV.**

**Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. Const. Art. 5 §5 (1974) provides:

> **§5. Supreme Court; Jurisdiction; Rule-Making Power; Assignment of Judges**
>
> Section 5. **(A) Supervisory Jurisdiction; Rule-Making Powers; Assignment of Judges.** The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court.
>
> **(B) Original Jurisdiction.** The supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar.
>
> **(C) Scope of Review.** Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law.
>
> **(D) Appellate Jurisdiction.** In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional; (2) the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed.
>
> **(E) Other Criminal Cases; Review.** In all criminal cases not provided in Paragraph (D) (2) of this Section, a defendant has a right of appeal or review, as provided by law.
>
> **(F) Appellate Jurisdiction; Civil Cases; Extent.** Subject to the provisions in Paragraph (C), the supreme court has appellate jurisdiction over all issues involved in a civil action properly before it.

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## STATEMENT OF THE CASE

In the spring of 1987, Christopher Wilkerson's parents began sending him to the Baton Rouge Speech and Hearing Foundation

where he was given individual speech therapy, once a week, for a speech impediment. The child then attended a special summer school program at the Foundation and was subsequently enrolled in the 1987 fall semester of daily instruction at the Foundation beginning in September. During the fall semester, every morning until noon, the child attended a class taught by Charlotte Sartain Provensa, while the defendant, Brian Bruce, or "B.B.", as he was commonly called, taught another class in a classroom across the hall. Each day at 12:30, after lunch, the child went to the defendant's classroom where the defendant supervised him and several other preschool and kindergarten children who stayed at school in the afternoon until 2:00 or 2:15 p.m. Because the child's mother worked, the child's maternal grandmother transported him to and from school on a regular basis.

Christopher Wilkerson was a happy child who loved school, had a particular fondness for "B.B.", and was very close to his father and grandfather. (R. pp. 71-72, 137, 158.) In the fall of 1987, his behavior began to change. (R. pp. 158-9.) Christopher quit talking about school, was reluctant to get dressed in the morning, and even began hiding his schoolwork in his grandmother's car. (R. p. 72.) Significantly, Christopher quit talking about "B.B." although he had previously talked about him all the time. (R. pp. 71, 97, 137.) He withdrew from his father and grandfather. (R. pp. 137, 158-59.) Although he had been potty trained since age one and a half, Chris began soiling his pants. (R. pp. 138, 159.) On one occasion, he grabbed his older brother's penis as the two bathed together and tried to put it in his mouth. (R.pp. 97-98.) His parents noticed that his rectum was, unexplainably, red and irritated. (R. p.140.)

On October 6, 1987, Christopher's grandmother arrived five to ten minutes late in picking up Christopher from school. (R. pp. 154, 157.) She looked in "B.B.'s" classroom, where Chris usually was, but found no one. She solicited the aid of a teacher's assistant, Marguerite Baronne, and the two walked through the school calling for Christopher within earshot of the closet where he was ultimately found, for approximately ten minutes. (R. pp. 158, 172, 297-98, 387.) Finally, the two women returned to "B.B.'s" classroom where they observed "B.B." and Chris emerge from a closed walk-in

closet. Christopher's grandmother, Jerry Bates, grabbed the child and left. (R. pp. 157, 165-67, 172, 387.)

Ms. Bates did not appreciate the significance of this closet incident until early November, 1987. On that date, she and her daughter, Debra Wilkerson, discussed Christopher's behavioral changes and began to put two and two together. (R. p.159.) They related their concerns to the police. (R. p. 159.)

At the police officer's suggestion, Christopher's parents took Chris to see a medical doctor. On November 9, 1987, Dr. B.F. Thompson conducted a physical examination of the child. The exam was inconclusive. (R. p. 144.) Later that evening, Joseph Wilkerson, Christopher's father, discussed the matter with Christopher. Based on what Christopher told him had occurred with "B.B.", Mr. Wilkerson signed an affidavit in support of a warrant for defendant's arrest. (R. p. 140.)

Christopher was taken to see Dr. Alan Taylor, a clinical psychologist capable of rendering an opinion regarding sexual abuse of children. Dr. Taylor conducted interviews on several occasions with Christopher and also interviewed his family and concluded that in his expert opinion, Christopher Wilkerson had been sexually abused. (R. pp. 190, 203-05.) He further explained that from the information he received from Chris concerning the type of abuse involved, there would be no physical evidence. (R. p. 220.)

After Christopher's parents pulled him out of the Baton Rouge Speech and Hearing Foundation and placed him in a new school, Christopher began returning to the child he had previously been. He began sitting on his father's lap again. (R. pp.140-41.) He liked school again. (R. p. 161.) However, when Dr. Taylor consulted Chris approximately one year after the abuse, the child still exhibited extreme anger towards defendant. (R. pp. 201-03.)

At trial, Christopher, then aged six years and eight months (R. p. 69), testified in open court and in a face-to face confrontation with the defendant that he did not like Mr. B.B. because he had done something that made Christopher not like the teacher. He stated that "B.B." had touched him in the "wrong place." When asked what the "wrong place" was, Christopher touched his genitals. (R. pp. 106-07.) He further stated that the touching took place in the closet near

his classroom at school. (R. p. 107.)

Additionally, Dr. Alan Taylor, a clinical psychologist capable of rendering an opinion regarding sexual abuse of children, testified that he had interviewed Christopher Wilkerson on several occasions as well as other family members. Dr. Taylor testified to the methods used in interviewing victims of sexual abuse and to the sessions he had with Christopher and his family. Based upon the behaviors exhibited by Christopher, the sessions with Christopher, and information supplied by family members, Dr. Taylor concluded that in his expert opinion as a clinical psychologist, Christopher Wilkerson had been sexually abused. (Tr. pp. 138-40; R. pp. 203-05.)

The defendant testified that he never touched the child's genitals. In explaining the reason he was seen leaving a closed closet/storage room with the child, he claimed that the child had been hiding and at the time the grandmother and teacher's aid came upon him he was merely escorting the child from the closet. (He did not offer an explanation as to why the door had been closed just before he exited the room with the child.) Obviously rejecting his explanation, the jury believed the child and other corroborating witnesses and returned a verdict of guilty to the charge of molestation of a juvenile.

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## REASONS FOR GRANTING THE WRIT

I. **To correct the Louisiana Supreme Court's misinterpretation of the requirements of due process as enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), so that convictions obtained in Louisiana's trial courts are reviewed under the correct due process standards in Louisiana's appellate courts.**

II. **To require the Louisiana First Circuit Court of Appeal to reconsider this case in light of the correct due process and *Jackson v. Virginia* requirements, giving the deference to this child victim's testimony that it is entitled and viewing the evidence as a whole in the proper light.**

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## ARGUMENT

With the decision *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court examined the due process clause of the Fourteenth Amendment to determine the level of proof which can constitutionally support a criminal conviction. In *Jackson*, this Court set forth the standard to be applied by federal courts in examining the sufficiency of the evidence upon which convictions obtained in state trial courts are based. Prior to the decision in *Jackson v. Virginia*, the Louisiana Supreme Court reviewed sufficiency of evidence using a no evidence test thought to have been mandated by the Louisiana constitutional proscription of review of facts in criminal cases.[1] Recognizing that appeals in criminal cases are permitted on questions of law alone, the court determined that, when the issue was sufficiency of evidence to support a conviction, a question of law was presented only when the defendant alleged a total absence of any factual support for a verdict.[2] With the adoption of the *Jackson* standard in *State v. Matthews*, 375 So.2d 1165, 1168 (La. 1979), as mandated by the federal due process clause, the Louisiana Supreme Court dramatically altered its approach to appellate review of sufficiency of evidence.[3] This new approach developed in Louisiana courts without significant consequence until the Louisiana Supreme Court rendered the decision *State v. Mussall*, 523 So.2d 1305 (La. 1988) in

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[1] La. Const. Art. V, §5(C) limits the Supreme Court's appellate jurisdiction in criminal cases "only to questions of law."

[2] *See State v. Hudson*, 373 So.2d 1294 (La. 1979), *rev'd* 450 U.S. 40 (1981); *State v. Baskin*, 301 So.2d 313 (La. 1974).

[3] This approach was codified in 1982 with the enactment of La Code Crim. P. art. 821, which established a *Jackson*-like standard for post-verdict motions of acquittal filed in the trial court based on insufficiency of evidence. *See State v. Captville*, 448 So.2d 76 at 678 (La. 1984). However, nothing therein altered the prohibition by the State Constitution that appellate courts do not evaluate the credibility of the witnesses or other factual matters. la. Const. Art. 5, §5(C) 1974; *State v. Richardson*, 425 So.2d 1228, 1232 (La. 1983).

1988,[4] which altered the *Jackson* test on reviewing the sufficiency of the evidence.[5]

In *State v. Mussall*, the Louisiana Supreme Court, for the first time since adopting the *Jackson* standard, sustained the reversal of a conviction on the ground that the trier of fact unreasonably accepted as "credible" the testimony of a certain witness.[6] The decision, on the ground that *Jackson* so requires, established the rule that the trier of fact's credibility findings are subject to review and that the reviewing court must view the evidence put on by both the state and the defense "from the perspective of a hypothetical rational trier of fact." *State v. Mussall*, 523 So.2d at 1310 (emphasis original). In that case, the Louisiana Supreme Court had originally granted certiorari "to consider the state's claim that the court of appeal did not apply the appropriate methodology in reversing the defendant's conviction but instead directly assessed the credibility of the witnesses and substituted its finding of a reasonable doubt for that of a rational trier of fact." *State v. Mussall*, 523 So.2d at 1306. Having only what it considered "the uncorroborated testimony of an eyewit-

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[4] *See, e.g., State v. Rosiere*, 488 So.2d 965, 968 (La. 1986); *State v. Captville*, 448 So.2d 676, 678 (La. 1984); *State v. Allen*, 440 So.2d 1330, 1333 (La. 1983); *State v. Dykes*, 440 So.2d 88, 93 (La. 1983); *State v. Sutton*, 436 So.2d 471, 474-475 (La. 1983); *State v. Chism*, 436 So.2d 464, 466 (La. 1983); *State v. Johnson*, 426 So.2d 95, 101 (La. 1983) (citing cases); *State v. Richardson*, 425 So.2d 1228, 1230-1231 (La. 1983); *State v. Graham*, 422 So.2d 123, 129 (La. 1982), appeal dismissed, *Graham v. Louisiana*, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983); *State v. Ennis*, 414 So.2d 661, 663 (La. 1982); *State v. Moody*, 393 So.2d 1212, 1215 (La. 1981); *State v. White*, 389 So.2d 1300, 1301 (La. 1980); *State v. Morgan*, 389 So.2d 364, 366 (La. 1980); *State v. Harveston*, 389 So.2d 63, 64 (La. 1980); *State v. Hartman*, 388 So.2d 688, 694 (La. 1980).

[5] *See State v. Bruce*, 577 So.2d 209 (La. App. 1st Cir. 1991); *State v. Burger*, 541 So.2d 842 (La. 1989); *State v. Hatcher*, 568 So.2d 578 (La.4th Cir. 1990); *State v. Bay*, 529 So.2d 845 (La. 1985).

[6] The court of appeal reversed the conviction. *State v. Musall*, 514 So.2d 505 (La. App. 4th Cir. 1987). The Louisiana Supreme Court granted the state's writ on application, 515 So.2d 1101 (La. 1987), and then affirmed the reversal, 523 So.2d 1305 (1988) (on rehearing).

ness" supporting the conviction, the Louisiana Supreme Court found itself "confronted with forceful conflicting arguments that a reviewing court must, on the one hand, give deference to the trier of fact's credibility call, and, on the other, reverse if no rational trier of fact would have found guilt beyond a reasonable doubt based upon the whole record." *State v. Mussall*, 623 So.2d at 1308.

Finding "that any rational trier of fact, after viewing all of the evidence as favorably to the prosecution as a rational fact finder can (emphasis supplied), necessarily must have a reasonable doubt as to the defendant's guilt," the Louisiana Supreme Court upheld the judgment of the Court of Appeal reversing the defendant's conviction. *State v. Mussall*, 533 So.2d at 1311. In reaching this conclusion, the Louisiana Supreme Court first set forth the legal principles governing review of insufficient evidence claims as it interpreted those rules to have been established by this Honorable Court in *Jackson*.

Although this court, in *Jackson v. Virginia*, indicated that the relevant inquiry to be made by the reviewing court is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt in light of the evidence which should be viewed in the light most favorable to the prosecution, the Louisiana Supreme Court turned its focus on the "rationality" of the trier of fact's reasoning process as well as its ultimate finding. In so doing the Louisiana Supreme Court erred in several respects. First the Louisiana Supreme Court predicated its entire analysis on both the opinion and concurring opinion. Throughout *Mussall*, the Louisiana Supreme Court focuses primarily on the concurring opinion in *Jackson*, weaving citations from the concurrence with the main text, in order to find support for its manipulation of the *Jackson* rule. This inappropriate reliance on the concurrence apparently contributed to the Louisiana Supreme Court's subsequent errors.

While continuing to recite to the language of this Court's pronouncements in *Jackson*, the Louisiana Supreme Court in *Mussall*, allegedly relying on *Jackson*, fashioned its own methodology of reviewing the sufficiency of the evidence which is in direct conflict both with the Louisiana Constitution and with the precepts enunciated by this Court in *Jackson*. For example, this Court in *Jackson* declared that the critical question in reviewing the sufficiency of the

evidence is whether "after (emphasis supplied) viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* at 2789. Furthermore, this Court explicitly stated that "[j]ust as the standard announced today does not permit a Court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder — if known." *Jackson* at 2789 n. 13. Disregarding this language of *Jackson*, however, the *Mussall* court, although claiming to be following the mandates of *Jackson*, first stressed that the principal criterion of *Jackson* is rationality (*Mussall* at 1310) and then required scrutiny of the reasoning process actually used by the factfinder. Thus, according to the Louisiana Supreme Court, the correct application of the *Jackson* standard is that if "rational triers of fact could disagree as to the interpretation of the evidence, the rational triers' view of all of the evidence most favorable to the prosecution must be adopted." *Mussall*, 523 So.2d at 1310 (emphasis original). The discrepancy between the appropriate methodology to be employed in reviewing evidence enunciated in *Mussall* and that pronounced in *Jackson* is apparent.

Thus, under *Jackson*, if State's witness "A"'s testimony differs from defense witness "B"'s and State's witness "C"'s testimony differs from defense witness "D"'s, then "A"'s and "C"'s versions should be accepted if believed by the trier of fact and, if the testimony sufficiently establishes the elements of the crime, the conviction should be upheld. *Mussall* misreads this procedure as requiring an initial review of the entirety of the evidence since, the Louisiana Supreme Court says, a rational factfinder would examine it that way, and then, only if rational triers of fact could disagree as to the appropriate interpretation of all of the evidence, resolve the disparity in favor of the prosecution. Given the previous hypothetical, *Mussall* may demand a different outcome than that obtained through application of the *Jackson* analysis if the testimonial versions of the evidence presented by "B" and "D", as read from a cold record, appear sufficiently plausible that the reviewing court imagines it may have had a reasonable doubt about the accuracy of the testimonial versions of the evidence presented by "A" and "C".

Because the standard of reviewing the sufficiency of the evidence by the Louisiana appellate courts is derived from *Jackson*, this Court should grant the writ of certiorari to correct the misapplication of *Jackson*.

Moreover, while *Jackson* states that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer (emphasis added) to that resolution; *Jackson* at 2793, the Louisiana courts, in their misinterpretation of *Jackson*, require an additional rationality analysis of the specific conclusions reached by the trier of fact, including credibility choices.[7] Thus, those facts and resolutions which this Court states must be deferred to by the reviewing court, the Louisiana courts, although claiming to be following *Jackson*,[8] require an analysis to determine both whether the factfinder was rational in reaching those conclusions concerning the "ultimate facts" as well as making those credibility choices. Because of this misinterpretation (and/or disregard) of *Jackson*, appellate courts in Louisiana are usurping the fundamental role of the jury in the name of *Jackson*.

The Louisiana Supreme Court's enunciation in *Mussall* of its misunderstanding of the *Jackson* standard has led to confusion and inconsistent consideration of insufficient evidence claims in Louisiana's appellate courts. Courts of Appeal in every circuit of the Louisiana system have relied upon *Mussall* in support of both their affirmations and reversals of lower courts' adjudications of guilt. *Mussall* has been cited for its characterization that the principal criterion of a *Jackson* review is rationality,[9] its assertion that the

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[7] *Mussall* at 1309-11; *Bruce* at 577 So.2d at 215-16.]

[8] That the authority for this required analysis is *Jackson* is apparent both becaue of the direct reference to *Jackson* and because the Louisiana Constitution prohibits such credibility evaluations. Art. 585(C) & *Richardson*, *infra*. Thus, there is no state basis for this perceived standard.

[9] *See, e.g., State v. Meredith*, 536 so.2d 555 (La. App. 1st Cir. 1988).

proper perspective from which to examine the evidence is through the eyes of the hypothetical rational trier of fact,[10] its articulation of the proper methodology for reviewing the record evidence,[11] and its approval of the second-guessing of credibility evaluations.[12] The prosecution of criminal cases in which only the victim and defendant are present, such as molestation or rape cases, and which, therefore, turn largely on credibility evaluations, has been particularly hampered by this misconstruction.[13] Indeed, if appellate courts are being required and encouraged to reassess on the basis of a cold record the credibility choices made by the factfinder, these hard fought convictions are most assuredly in jeopardy, as evidenced by the instant case.

The case upon which this application for writ of certiorari is based, *State v. Brian Bruce*, is a prime example of the type of havoc which Louisiana's misinterpretation of *Jackson* is wreaking on convictions which depend largely on credibility evaluations. Particularly in child witness cases involving sexual abuse where the ultimate question is often who the jury believes, the resolution of credibility is solely within the province of the jury, and nothing in *Jackson* mandated change in that regard. In evaluating the evidence supporting defendant Brian Bruce's conviction for molestation of a juvenile, the Louisiana First Circuit Court of Appeal held:

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[10] *See e.g. State v. Meredith, supra; State v. Cashen 544 So 2d 1268 (La. App. 4th Cir. 1989).*

[11] *See, e.g., State v. Fuqua*, 558 So.2d 740 (La. App. 3d Cir. 1990); *State v. Meredith, supra.*

[12] *See, e.g., State v. Brian Bruce, supra, See, e.g., State v. Hatcher*,568 So.2d 578 (La. App. 4th Cir. 1990); *State v. Burger*, 531 so.2d 1163 (La. App. 4th Cir. 1988); *writ granted*, 541 So.2d 842 (La. 1989) *and remanded for consideration in light of State v. Mussall*, 523 So.2d 1305 (La. 1988); *on remand*, 550 So.2d 1282, *writ denied*, 556 So.2d 1276 (La. 1990) (two justices would grant the writ).

[13] *See, e.g., State v. Brian Bruce, supra; State v. Powell*, 438 So.2d 1306 (La. App 3d Cir. 1983).

> [T]he remaining evidence boils down to the October 6, 1987 closet incident and the child's testimony at trial. with regard to the closet incident, we find the hypothesis of innocence presented by the defendant sufficiently reasonable that any rational trier of fact would have had a reasonable doubt as to defendant's guilt . . . Therefore, the prosecution's case hinges on the testimony of the child. Simply because the child's testimony tends to support each fact necessary to constitute the crime charged, we may not disregard our duty under due process of law as interpreted by *Jackson v. Virginia*. *State v. Mussall*, 523 So.2d at 1311.

(*State v. Brian Bruce*, at 215-216) (emphasis added; footnote omitted). The court then reviewed the child's testimony in a light blatantly favorable to the defendant, focusing on the child's young age and prior reluctance to openly offer details of the crime and ultimately concluded that "the decision of the jury to convict this defendant based on the evidence presented [was] irrational and unsupported." (*State v. Brian Bruce*, at 216.)

That the Louisiana appellate courts are disregarding the legal conclusion announced in *Jackson* that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution is highlighted by the acknowledgement in *Bruce* that "the child's testimony tend[ed] to support each fact necessary to constitute the crime charged." (Emphasis added.) *Bruce*, 577 So.2d at 216. Despite this concession to the record testimony, the *Bruce* court, explicitly relying on *Jackson*, reversed the conviction.

However, had the *Bruce* court correctly applied the *Jackson* standard as opposed to the distorted standard of review now being utilized in Louisiana under the guise of *Jackson*, the conviction certainly would have been affirmed. The child victim in *Bruce* testified that while alone in the closet his teacher, the defendant, touched him on his genitals. In direct contradiction, the defendant testified that he never touched the child on his genitals and explained his presence in the closet with the child as a consequence of the child hiding. Having observed the demeanor of both the victim and the defendant, the jury returned a verdict of guilty, obviously resolving the credibility choices in favor of the testimony of the

victim and other corroborating state witnesses. Under *Jackson*, the viewing court must defer to those resolutions of conflicting testimony, and then, taking those facts, must determine if any rational trier of fact could have found the essential elements beyond a reasonable doubt. What Louisiana appellate courts are now doing in the name of *Jackson*[14], as evidenced by the instant case, is first assessing whether the evidence in the light most favorable to the State is rational, thereby requiring scrutiny of the reasoning process, an analysis the *Jackson* court explicitly stated was not required.[15] By requiring this extra layer of analysis Louisiana courts are in effect promoting, and indeed mandating, the reviewing court to "second-guess," from a cold record, the credibility choices as well as other resolutions of factual conflicts made by the trier of fact. Such evisceration of the role of the jury is abhorrent to the fundamental principles of the Louisiana Constitution's system of appellate review, and is certainly not mandated by the teachings of *Jackson*. To end this impermissible usurpation of the factfinder's historical function, in the sole name of this court's decision in *Jackson*, the State of Louisiana implores this Court to grant this writ of certiorari to correct the injustices now being perpetrated by the courts in Louisiana under the mistaken belief that *Jackson* so requires.

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[14] As noted earlier, the only basis for the court's review/analysis is *Jackson*, since state law prohibits the review of questions of fact in criminal cases.

[15] *Jackson* at 2785 n. 13.

## CONCLUSION

For the foregoing reasons, this Court should grant the writ requested.

*Respectfully submitted,*

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APPENDIX

STATE of Louisiana
v.
Brian BRUCE.
No. KA 90 0562.
Court of Appeal of Louisiana,
First Circuit.
March 5, 1991.

Bryan Bush, Dist. Atty., by Jessie Bankston, Asst. Dist. Atty., Office of Dist. Atty., Baton Rouge, for plaintiff, appellee.

Robert Klenipeter, Baton Rouge, for defendant, appellant.

Before EDWARDS, WATKINS and LeBLANC, JJ.

EDWARDS, Judge.

Defendant, Brian Bruce, was charged in a two-count indictment with the commission of molestation of a juvenile over whom he had control or supervision against a four-year-old boy (count 1) and against a five-year-old boy (count 2), violations of LSA-R.S. 14:81.2. Defendant was tried by a jury which convicted him as charged on count 1 and acquitted him on count 2. The trial court sentenced him to imprisonment at hard labor for a term of fifteen years. The sentence was suspended and defendant was placed on active supervised probation for five years, subject to general and specific conditions. Defendant's motion for post verdict judgment of acquittal and/or new trial was denied. Defendant now appeals his conviction on count one.

FACTS

The testimony elicited at trial reflects the following sequence of events:

In the spring of 1987, the victim's parents began sending him to the Baton Rouge Speech and Hearing Foundation where he was given individual speech therapy, once a week, for a speech impediment. The child then attended a special summer school program at

the Foundation and was subsequently enrolled in the 1987 fall semester of daily instruction at the Foundation in September. During the fall semester, every morning until noon, the child attended a class taught by Charlotte Sartain Provensa, while the defendant taught another class in a classroom across the hall. Each day at 12:30, after lunch, the child went to the defendant's classroom where the defendant supervised him and the other preschool and kindergarten children who stayed at school in the afternoon until 2:00 or 2:15 p.m. Because the child's mother worked, the child's maternal grandmother transported him to and from school on a regular basis.

The child's parents and grandmother testified that in September, 1987, the child began to display certain behavorial changes which caused them concern. Specifically, they recounted that the child initially loved school and frequently came home with papers to show and stories to tell. Suddenly, the child began to display an unusual dislike for school, an unwillingness to get out of bed in the mornings, and a reluctance to talk with them about school. The child, who had been toilet trained, also began soiling his pants.

The child's ten-year-old brother testified that he and the child had frequently bathed together and that one day, the child grabbed his penis, and tried to put it in his mouth. The brother informed his mother of the child's behavior, and she instructed the two to stop bathing together.

One day, on or about October 6, 1987, the child's grandmother was about five or ten minutes late in arriving at the Foundation to pick up the child after school. When she arrived at the school, she went to defendant's classroom where she ordinarily picked up the child. Finding on one in the classroom, she went outside to look for him in the playground. She reentered the school building and encountered Marguerite "Boots", a teacher's aide, who helped her look for the child. They went back to defendant's classroom, calling out the child's name. Once they were inside the classroom, a door to the supply closet, located adjacent to the classroom, opened and the defendant and the child exited the closet. The grandmother

testified that she and the child then left the school.

In early November, the child's mother and the grandmother conferred with one another about the various behavioral changes in the child. The grandmother related the October 6 closet incident to the mother, and together they concluded that there was "something going on." They next talked to a friend who was affiliated with the police, and on approximately November 9, 1987, they reported the matter to the police. The victim's father testified that he first learned of the incident when his wife and her mother telephoned him from the police station and informed him of their actions. He later had a conversation with the child, after which he went to the police station and signed a sworn affidavit for defendant's arrest.

At the recommendation of the police, the child was examined by a doctor. The examination, performed by Dr. B.F. Thompson, failed to show any evidence that the child had been sexually abused.

The child's parents then removed him from school at the Foundation and placed him in another school.

The parents testified that they took the child to the District Attorney's office on several occasions. On these occasions, the child would be taken into a separate room with a District Attorney office representative. No one else was present at these meetings, and there was no testimony at the trial regarding the content of these sessions.

At the recommendation of the District Attorney's office, the parents took the child to a clinical psychologist, Dr. Allen Taylor. Dr. Taylor conducted an initial series of six sessions with the child on February 1, 3, 17, and 23, 1988, and March 9 and 17, 1988. . Taylor testified that the child was extremely reluctant to talk, and shook his head vigorously in response to questions or statements regarding the alleged abuse. In order to aid the child's communication, . Taylor employed the use of anatomically correct dolls. He testified that the use of these dolls to determine the occurrence of sexual abuse in children is highly controversial, however, he uti-

lized them when working with developmentally handicapped children. He used them in this case based on the child's unwillingness to communicate and in light of the child's speech and language delay. Dr. Taylor concluded these sessions in March since he felt it unlikely that the child would be or could be cooperative with further prodding and that the child had given all the information that he was capable of giving at the time.

Approximately eight months later,[16] Dr. Taylor saw the child again. This time, Dr.Taylor noted that the child was much more verbal and much more interested in and able to communicate. The child did continue to display some reluctance to talk; the reluctance was "much more confined to the doll play and the accounts of what had happened." He again employed the use of the anatomically correct dolls in his sessions with the child. Dr. Taylor testified that, based upon his observations of the child engaged in doll play and of the child's accompanying verbalizations, in his expert opinion, the child had been abused.

Approximately nine months after the second set of sessions with Dr. Taylor, the trial in the matter was held. The child testified at trial as follows:

Q. Do you remember a man named Mr. B.B.?[17]

A. Yes, Sir.

Q. And how do you know Mr. B.B.?

A. Where I go to school.

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[16] Dr. Taylor testified that he did not see the family again until about four or five months later. However, our review of the record indicates that at least an eight-month period had elapsed.

[17] The record reflects that defendant, Brian Bruce, was generally also known and referred to by the students, parents, and teachers at the Foundation as "B.B." or "Mr. B.B."

Q. Where you go to school?

A. Yes, Ma'am.

Q. Do you like Mr. B.B.?

A. No.

Q. No.

Mr. Kleinpeter: I object now, may it please the court. I haven't heard the child say anything.

The court: He nodded his head.

By Ms. Bernie.

Q. Can you answer that question with a word?

A. Yes.

Q. Do you like Mr. B.B.?

A. No, Ma'am.

Q. Did he do something that made you not like him?

A. Yes.

Q. Did you answer with a word?

A. Yes, Ma'am.

Q. Can you tell us what Mr. B.B. did that made you not like him? Did he dosomething to you?

A. Yes, sir.

Q. Did he touch you?

A. Yes.

Q. Can you tell us where he touched you?

A. Wrong place.

Q. Can you show us where that wrong place is?

Ms. Bernie: I would like the record to reflect the witness touched his genitals.

By Ms. Bernie.

Q. Did you want him to do that?

A. No.

Q. And what did you do when he did that?

A. Nothing.

Q. Nothing. Where were you when he did that?

A. In the closet.

Q. In the closet. Where was the closet?

A. By the bathroom.

Q. Was that near your classroom at school?

A. Yes, Sir.

Q. Did Mr. B.B. make you do anything to him?

A. No.

Q. Did he try?

A. No, Ma'am.

Mr. Kleinpeter: I object. This child is-he said he did not make him do anything.

The court: Sustained.

By Ms. Bernie.

Q. Did Mr. B. B. ever hurt you any other way?

A. No.

Q. [Child], are you telling us the truth?

A. Yes.

The defendant also testified at trial. He began working at the Foundation in 1973 and worked there continuously up to the time of his arrest in November, 1988. He denied ever having touched or made an improper move toward any child at the Foundation, particularly the two children specified in the charges. He particularly denied ever having attempted to sexually abuse any child. When questioned about the October 6, 1987, closet incident, his testimony was as follows:

A. Yes, I remember that.

Q. What happened on that date?

A. Well, as far as I remember it was a fairly normal day. There were about five or six children in the class. At 2:15 when it was time for the parents to come, I asked one of the children to open the door and when the parents came in, I gave some of them,—I matched the children to the right parents and then there were two or three—I guess two children that went across the hall to day care

because their parents worked. I took them across the hall. When I came back—

Q. Let's stop there. You had a day care for people who worked and could not come at 2:15?

A. Yes.

Q. You took two children over there?

A. Yes, Sir, I did. And then I came right back and [child's] grandmother who was not there—and [child]—I had left him in the room just as I walked across the hall. When I came back he was gone. I was concerned because you know when you lose a child in a school, you become concerned about what could happen to them.

Q. Did you have problem [sic] with him hiding?

A. Yes, Sir, I have. That was one of the games he played.

Q. What did you?

A. When I saw he was not in the classroom, I looked everywhere I could in the classroom. I did not see him under the desks or the chairs. I went down the hall away from the office to—the offices which are a number of rooms—

Q. Is that the exit toward the street?

A. There is another exit away from the regular exit, but there is another exit the other way, and I was concerned he might go out that exit.

Q. Had you thought of looking in the bathroom or the closet prior to that time?

A. No, Sir, I had not.

Q. Were you more concerned about him getting out of the building?

A. Yes, certainly. I went down that hall and checked every one of those rooms. And when I did not find him, I came back to the classroom and I checked the other classrooms too, and when I came back to the classroom where he started, and when I did not see him again, I looked in the bathroom and then I noticed a door to the closet was closed and I opened it up and there he was.

Q. What did he do? Did he come out?

A. No. He was kind of playing. So, I just asked him, I said, let's go, (child).

Q. Did he come?

A. Yes, he did.

Glynda Barnes, the Director of the Foundation at the time of the incident, testified at trial. She testified that the Foundation had an open-door policy whereby parents and teachers were able and encouraged to observe the classroom settings and their teachers at any time. Each classroom had one wall which was a one-way mirror, and usually an open window on the opposite wall. She had no first-hand knowledge about the October 6 closet incident; however, she stated that she was very much aware of this particular child's propensity for hiding, as the other teachers had talked about having to look for him on occasion because he liked to hide for fun.

Charlotte Provensa, a teacher at the Foundation, testified that "it was not unusual at all for (the child and two other children) to go run and hide in the closet. It happened frequently." Typically, she said it was this particular child (the alleged victim) who went into the closet.

Elizabeth Welch, a teacher and speech therapist at the Founda-

tion, testified that she taught in the classroom directly across from the defendant. She stated that she had open accessibility to the same closet, and that she was frequently in and out of the closet on a daily basis getting supplies.

Marguerite , the teacher's aide who helped the child's grandmother look for him on the afternoon of October 6, 1987, testified that she and the grandmother went into the defendant's classroom to look for the child and that, once she stepped into the classroom, she observed the defendant with the child, standing in the hallway right outside the storage closet. She testified that the child was fully clothed and she saw nothing alarming, out of the ordinary, or unusual about the situation.

Several other witnesses, including teachers and parents of students at the Foundation, testified regarding the good character and reputation of the defendant.

At trial, the defendant elicited the testimony of two clinical psychologists, William Owen Scott and Mary Lou Kelly, who performed a joint evaluation of Dr. Taylor's report. They testified that they found significant problems with Taylor's report. Primarily, they objected to his reliance on the use of the anatomically correct dolls in reaching his conclusion that the child had been abused, when it is "very clear and widely accepted that dolls should not be used to draw conclusions about whether or not a child was sexually abused." Their own findings regarding whether sexual abuse had occurred or whether this defendant abused the child were inconclusive; they had not themselves examined the child and their findings were not restricted to their review of Dr. Taylor's report.

All three psychologists, Drs. Taylor, Scott, and Kelly, testified that the behavioral changes in the child (sudden dislike for school, soiling his pants, etc.), while consistent with sexual abuse, are likewise indicative of other, unrelated psychological problems, and that the exact cause of such changes was indeterminable.

## COMPETENCY OF THE CHILD

[1] Defendant first argues that the trial court erred in ruling that the child was competent to testify. A review of the record reveals that defendant failed to enter a contemporaneous objection to the child's competency as required by LSA-C. Cr.P. art. 841. Therefore, this assignment of error has no merit.

## SUFFICIENCY OF THE EVIDENCE

Defendant next asserts that the evidence was insufficient to support a conviction on the crime charged in count 1.

[2,3] In reviewing the sufficiency of the evidence, we are controlled by the standard enunciated by the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), now codified in LSA-C.Cr.P. art. 821. Under that standard, the evidence, viewed in the light most favorable to the prosecution, must be sufficient to convince a rational trier of fact that all of the elements of the crime have been proved beyond a reasonable doubt. *State v. Jacobs*, 504 So.2d 817 (La. 1987). The explicit right of a person accused of a crime to be presumed innocent until proven guilty provides an additional guarantee against criminal conviction based on inadequate evidence. La. Const., Art. 1, § 16; *State v. Mussall*, 523 So.2d 1305 (La. 1988).

The elements of the crime of molestation of a juvenile are set out in LSA-R.S. 14:81.2, which provides in pertinent part:

A. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of ... influence by virtue of a position of control or supervision over the juvenile.

When circumstantial evidence is used in proving the commis-

sion of an offense, the evidentiary standard of LSA-R.S. 15:438 forms part of the broader inquiry in assessing the sufficiency of the evidence under the *Jackson* standard of appellate review. LSA-R.S. 15:438 states: "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This is not a purely separate test from the *Jackson* sufficiency standard to be applied instead of a sufficiency of the evidence test.... Ultimately all evidence, both direct and circumstantial, must be sufficient under *Jackson* to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Rosiere*,488 So.2d 965 (La.1986).

In evaluating the sufficiency of the evidence to convict this defendant, we are guided by the conclusions reached by our Supreme Court in *State v. Mussall*, 523 So.2d 1305 (La.1988), regarding the application of the *Jackson* standard. In *Mussall*, the Louisiana Supreme Court stated:

The principal criterion of a *Jackson v. Virginia* review is *rationally*. This is because under Winship and Jackson Fourteenth Amendment due process demands that in state trials, as has been demanded traditionally in federal trials, a criminal conviction cannot constitutionally stand if it is based on a record from which no *rational* trier of fact could find guilt beyond a reasonable doubt. Accordingly, under the Jackson methodology a reviewing court is required to view the evidence from the perspective of a hypothetical *rational* trier of fact in determining whether such an unconstitutional conviction has occurred. In reviewing the evidence, the whole record must be considered because a *rational* trier of fact would consider all of the evidence, and the actual trier of fact is presumed to have acted *rationally* until it appears otherwise. If *rational* triers of fact could disagree as to the interpretation of the evidence, the *rational* trier's view of all of the evidence most favorable to the prosecution must be adopted. Thus, *irrational* decisions to convict will be overturned, *rational* decisions to convict will be upheld, and the actual fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law.

The Jackson doctrine or methodology is a compromise between the one extreme that maximizes the protection against the risk that innocent persons will be erroneously convicted by appellate replication of criminal trials and the other extreme that places the greatest faith in the ability of the triers of facts to produce just verdicts. Not only did the Supreme Court abjure any requirement that a reviewing court retry the issue of guilt, but it also rejected all forms of limited review under which a partial or one-dimensional view of the evidence is accepted as an index of its actual probative value. The Jackson doctrine does not permit the reviewing court to view just the evidence most favorable to the prosecution and then to decide whether that evidence convinced it beyond a reasonable doubt. Nor does it require a court to decide whether, based on the entire record, the *average* rational trier of fact could be convinced of guilt beyond a reasonable doubt. And of course, the high court abrogated the "no evidence" rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) because "it could not seriously be argued that...a modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt." [emphasis in original; footnotes omitted]

*State v. Mussall*, 523 So2d at 1310.

This interpretation of the *Jackson* standard has influenced our courts since *State v. Mussall*, supra. See *State v. Lubrano*, 563 So.2d 847, 850 (La.1990); *State v. Burger*,541 So.2d 842 (La. 1989) (writ granted and remanded to Court of Appeal for reconsideration in light of *State v. Mussall*), 550 So.2d 1282 (La.App. 4th Cir. 1989), *cert. denied*, 556 So.2d 1276 (La.1990); *State v. Bay*, 529 So.2d 845, 851 (La.1988); *State v. Daigrepont*, 560 So.2d 959 (La.App. 3d Cir.), *cert. denied*, 566 So.2d 396 (La. 1990); *State v. Fuqua*, 558 So.2d 740, 742 (La. App. 3d Cir.), *cert. denied*, 565 So.2d 442 (La. 1990); *State v. Toups*, 546 So.2d 549 (La.App. 1st Cir.1989); *State v. Barrett*, 544 So.2d 654, 659 (La.App. 3d Cir.), *cert. denied*,551 So.2d 1336 (La.1989); *State v. Cashen*, 544So.2d 1268, 1275 (La. App. 4th Cir. 1989); *State v. Thomas*, 538 So.2d 1021 (La.App. 3d Cir.1988); *State v. Meredith*, 536 So.2d555 (La.App. 1st Cir.1988), *cert. denied*, 544 So.2d396 (La.1989).

After a thorough review of the record in the present case, we find that the prosecution established the following elements of the crime charged by direct evidence: (1) that the defendant was 41 years old; (2) that the child was four years old; and (3) that the defendant had a position of control or supervision over the child. We now evaluate the remaining evidence, in the light most favorable to the prosecution, to determine whether it is sufficient to convince a rational trier of fact that the defendant, Bruce, committed a lewd or lascivious act upon the four-year-old child, with the intention of arousing or gratifying the sexual desires of either person.

[4] The remaining evidence boils down to the October 6, 1987, closet incident and the child's testimony at trial.[18] With regard to the closet incident, we find the hypothesis of innocence presented by the defendant sufficiently reasonable that any rational trier of fact would have a reasonable doubt as to defendant's guilt. According to the defendant, the child was hiding in the closet. He had just found the child and they were both exiting the closet when the child's grandmother and the teacher's aide, Marguerite , entered the classroom.

The defendant's explanation regarding the incident on October 6, 1987, was supported by the testimony of the director of the Foundation, Glynda Barnes, and by another teacher at the Foundation, Charlotte Provensa, who both testified that the child had a propensity for hiding and particularly liked to hide in that closet. There is no evidence in the record to contradict defendant's explanation that he first went to the exits leading outside to look for the child before he checked the closet; in fact, the child's grandmother admitted that it was possible that the defendant was looking for the child at the same time that she was.

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[18] The record also contains the testimony of three clinical psychologists, however, as discussed earlier, their testimony was wholly inconclusive as to whether sexual abuse had in fact occurred.

Marguerite testified that she did not notice anything unusual or alarming when the child and the defendant exited the closet. The child's grandmother testified that the child was fully clothed and was not crying or acting unusual after he came out of the closet. The circumstantial evidence of the closet incident presented by the prosecution fails to exclude the very reasonable explanation that the child was hiding and that the defendant found him in the closet and brought him out into the classroom.

Therefore, the prosecution's case hinges on the testimony of the child. Simply because the child's testimony tends to support each fact necessary to constitute the crime charged, we may not disregard our duty under due process of law as interpreted by *Jackson v. Mussall*, 523 So.2d at 1311.

The child was four years old at the time of the alleged abuse. Criminal proceedings were instigated against the defendant by the child's mother and grandmother who reported their suspicions to a friend affiliated with the police department. Following the defendant's arrest, the child was confronted and questioned about the alleged abuse to which he first responded by shaking his head vigorously and emphatically and repeatedly said nothing. Some eight or nine months later, when questioned again, he was still reluctant verbally to recount information regarding the alleged abuse. During the two years that elapsed prior to trial, he was counseled, in private, by members of the District Attorney's office. The child's mother testified that at least two of these visits to the District Attorney's office occurred during the weeks prior to the trial. By the time of the trial, the child was six years old. His testimony consisted of one-word (i.e., yes, no) answers to very specific leading questions. Essentially, the only incriminating testimony elicited from the child at trial was that the defendant touched the child in the "wrong place," to which the child designated, by gesturing to his genitals.

Given this record, we conclude that any rational trier of fact, viewing the evidence as favorably to the prosecution as a rational fact finder can, *must* have a reasonable doubt as to the defendant's

guilt. We find the decision of the jury to convict this defendant based on the evidence presented irrational and unsupported, and, accordingly, we reverse.

REVERSED.

STATE OF LOUISIANA

v.

BRIAN BRUCE

No. 91-K-0781.
Supreme Court of Louisiana

May 24, 1991.

In re State of Louisiana:—Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, No. KA90 0562; Parish of East Baton Rouge, 19th Judicial District Court, Div. "C", No. 9-88-984.

Prior report: La.App., 577 So.2d 209.

Writ denied.

STATE OF LOUISIANA

v.

BRIAN BRUCE

No. 91-K-0781.
Supreme Court of Louisiana

June 28, 1991.

In re State of Louisiana applying for Reconsideration of Writ denied May 24, 1991 from the Court of Appeal, First Circuit No. KA90 0562; Parish of East Baton Rouge 19th Judicial District Court Div "C" Number 9-88-984.

June 28, 1991.
Reconsideration denied.